No. 84-1535

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In The

Supreme Court of the United States

October Term, 1984

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,

Petitioner,

vs.

GERLING GLOBAL GENERAL INSURANCE COMPANY, NORTHUMBERLAND GENERAL INSURANCE, COMMONWEALTH INSURANCE COMPANY, ELITE INSURANCE COMPANY, SCOTTISH & YORK INSURANCE COMPANY, SOVEREIGN GENERAL INSURANCE, FUTURA AIRLINES, LTD., FUTURA AVIATION SERVICES, LTD. AND ATLANTIC AVIATION CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. In an action to recover for damaged cargo under the Carmack Amendment (49 U.S.C. § 20(11) (repealed)) and its successor provision (49 U.S.C. § 11707(a)(1)), where it is asserted the the cargo had no or little market value because testing would be required to determine the extent of damage, but after later testing, the cargo is sold for $36,000, are the First, Fifth, Seventh and Ninth Circuit Courts of Appeal correct in holding that a "market value at the time of delivery" standard does not accurately embody the "actual loss or injury" standard prescribed by statute, or is the Third Circuit Court of Appeals correct in uniformly applying a market value test in all cases?

2. When should evidence of actual condition and damage derived from testing performed after the time of delivery of damaged cargo and of the sale of goods subsequent to testing and/or repair be considered in fixing damages under the Carmack Amendment and its successor provisions?

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Opinion and Judgment of the United States Court of Appeals 1a

No.

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GERLING GLOBAL GENERAL INSURANCE COMPANY, NORTHUMBERLAND GENERAL INSURANCE, COMMONWEALTH INSURANCE COMPANY, ELITE INSURANCE COMPANY, SCOTTISH & YORK INSURANCE COMPANY, SOVEREIGN GENERAL INSURANCE, FUTURA AIRLINES, LTD., FUTURA AVIATION SERVICES, LTD. AND ATLANTIC AVIATION CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Consolidated Freightways Corporation of Delaware, respectfully prays that a writ of certiorari issue to review the judgment and the opinion of the United States Court of

Appeals for the Third Circuit entered in this proceeding on December 18, 1984.

OPINION BELOW

The opinion of the Court of Appeals, not reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Delaware.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on December 18, 1984. A timely petition for rehearing and rehearing en banc was denied on January 17, 1985, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 49, Section 11707(a)(1):

> The liability imposed under this paragraph is for *the actual loss or injury* to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and applies to property reconsigned or diverted under a tariff filed under subchapter IV of Chapter 107 of this title, (emphasis added).

STATEMENT OF THE CASE

Futura Aviation Services, Ltd. and Futura Airlines, Ltd. (herein after referred to as Futura) owned a Rolls Royce Viper engine (with cowls), which they agreed to sell to Bronxville Equipment Company for $40,000. They hired Consolidated Freightways Corporation of Delaware (herein after referred to as Consolidated Freightways), a common carrier, to transport the engine from Vancouver, Canada to Atlantic Aviation in Wilmington, Delaware. Futura prepared the engine for shipment and selected a shipping crate and packing material. The engine was delivered by Consolidated Freightways to Atlantic Aviation, where it was unloaded by use of a forklift by an Atlantic Aviation employee and placed on dock. No exceptions were placed on the bill of lading. Several days later, an inspection revealed damage to the packing material and exterior of the engine, including the cowling. There was some testimony that Atlantic's driver caused some damage to the engine when he unloaded the engine with the forklift. There was also testimony that Futura had used the wrong shipping methods, including use of the wrong shipping cradle, and had not followed the shipping instructions contained in the Rolls Royce Manual.

Futura submitted a claim to their insurers. After negotiations, the insurers settled the claim for a payment of $29,950 and became subrogated to Futura's rights. Subsequently, the engine was transported to Rolls Royce Corporation in Montreal, Canada. Tests were performed costing $8,605.08 Canadian dollars (approximately $6,500.00 U.S. dollars). The engine was then sold to the original intended purchaser for $36,000.

As subrogees, the insurers, as well as Futura, instituted this action against Consolidated Freightways and Atlantic Aviation. They claimed that the engine had no market value immediately after its delivery in damaged condition because the extent of the

damage to the interior of the engine (primarily the possibility of shock loading) if any was unknown and that no person would buy such an engine with unknown damage. They argued that the results of the subsequent testing which did not disclose damage and which convinced Bronxville Equipment to purchase the engines, without a cowl, for $36,000 could not be considered because it would not have been known to a potential purchaser at the moment of the delivery of the damaged engine.

Although the Trial Court admitted evidence of the costs of testing and the subsequent sale, the Trial Court instructed the jury that it must disregard that evidence unless it found that a willing buyer would have been able to ascertain the costs of repair and testing, or would have been willing to spend whatever it cost to determine the extent of the damage to the engine.

The jury made the following findings in response to special interrogatories: (1) The engine was not damaged when delivered by Futura to Consolidated Freightways; (2) the engine was damaged when it was delivered by Consolidated Freightways to Atlantic Aviation; (3) The damage resulted in a reduction of value. The jury found that "negligent packing by Futura was the proximate cause of any damage which occurred while the engine was in the possession of Consolidated Freightways." However, the jury also found that Consolidated Freightways had not sustained its burden of proof that Consolidated's negligence was not the proximate cause of the damage to the engine. Finally, the jury found that the difference in value was $30,000. This was the same amount as the total value for the engine placed on the bill of lading by Futura.

After post-trial motions, judgment was entered in favor of Plaintiffs and Defendant Atlantic Aviation and against Consolidated Freightways, without opinion. The United States Court of Appeals for the Third Circuit affirmed the decision of

the Trial Court in memorandum opinion which is included as an Appendix.

REASONS FOR GRANTING THE WRIT

I.

The decision below conflicts with the decisions of other Circuit Courts of Appeal as to the proper interpretation of 49 U.S.C. § 11707(a)(1) and its predecessor, the Carmack Amendment (49 U.S.C. § 20(11) (repealed)).

Both the measure of liability and the measure of damages in the case involving a cargo claim against a common carrier engaged in the interstate or international transportation of cargo is prescribed by federal statute. The current applicable standard for measuring damages is found in Section 11707(a)(1) of Title 49, as recodified, and states

> The liability imposed under this paragraph is for *the actual loss or injury* to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and applies to property reconsigned or diverted under a tariff filed under subchapter IV of Chapter 107 of this title, (emphasis added).

This section is the successor to the venerable Carmack Amendment, 49 U.S.C. § 20(11) (repeated) which made carriers liable "for the full actual loss, damage or injury . . . caused by them to property they transport." *Missouri Pacific Railroad Co.*

v. Elmore & Stahl, 377 U.S. 134, 137, 84 S. Ct. 1142, 12 L. Ed. 2d 194, 197 (1964).

At the moment when it was discovered that there had been damage to the exterior of the engine or its packing, no one could determine by visual observation or simple inspection whether the interior of the engine had been damaged. Subsequently, appropriate testing was accomplished at a facility with the necessary equipment and expertise to perform the testing. These tests and inspections disclosed that the engine had not been shock loaded and could be used. These tests disclosed that the interior of the engine was not significantly damaged at the time of delivery.

The Trial Court held and the Third Circuit affirmed that the evidence of determination at a cost of $6,500 that the interior of the engine was not shock-loaded and the subsequent sale of the engine for $36,000 could be totally disregarded unless a willing purchaser would have spent that $6,500 to determine the condition of the engine, or would have realized that the expenditure of $6,500 would raise the value of the engine to $36,000 (Tr. G-14, 15). These Courts adopted these positions because they believed that the "actual loss or injury to the property" should be measured by a "market value test," which focused on what a willing purchaser would pay for the engine immediately upon arrival in its outwardly damaged form prior to any repairs or technical inspections.

In so holding, the Third Circuit adopted a simplistic standard which mandates a significant deviation from the statutary "actual loss or injury" standard and compels the jury to disregard competent evidence of the condition of the damaged cargo at the time of delivery. This position is in direct conflict with the holdings of several other Circuit Courts of Appeal.

The First, Fifth, Seventh and Ninth Circuit Courts have agreed that the "market value" test, often is not an accurate

measure of the "actual loss or injury" to a shipper's property, which is the statutary measure of damages. *United States v. Palmer & Parker Co.*, 61 F.2d 455, 459 (1st Cir. 1932); *Hector Martinez & Co. v. Southern Pacific Transportation Co.*, 606 F.2d 106 (5th Cir. 1979), *cert. denied*, 446 U.S. 982, 100 S. Ct. 2962, 64 L. Ed. 2d 838 (1980); *Great Atlantic & Pacific Tea Co. v. Atchison, T. & Ste.F.Ry.*, 33 F.2d 705 (7th Cir. 1964), *cert. denied*, 379 U.S. 467, 85 S. Ct. 661, 13 L. Ed. 2d 560 (1965); *F.J. McCarty Co. v. Southern Pacific Co.*, 428 F.2d 690 (9th Cir. 1970). Each of these Circuit Courts have held that the "market value" test, although useful, is not mandated by Statute and that it should not be used when some other, more accurate method for determining the "actual loss or injury to the property" is available under the facts of a particular case.

The Third Circuit apparently was misled by the fact that in the case of *Gulf, Colorado & Santa Fe Railway Co. v. Texas Packing Co.*, 244 U.S. 31, 37 S. Ct. 487, 61 L. Ed. 970 (1917), which arose under the Cormack Amendment, Justice Day affirmed the use of a market value standard. The Plaintiff was claiming damages for the deterioration of poultry because the cars containing the poultry were not re-iced as required. Defendant, who was found liable, argued that the value of the deteriorated poultry should be determined by the value at the place of shipment or at an intermediate station where the deterioration was discovered. The Court argued that the value at the place of destination should control, notwithstanding a stipulation between the parties in the bill of lading. Justice Day explained

> Apart from the stipulation of these bills of lading, the ordinary measure of damages in cases of this sort is the difference between the market value of the property in the condition in which it should have arrived at the place of destination and its market value in the condition in which, by fault of the carrier, it did arrive.

244 U.S. at 36, 37 S. Ct. at 489, 61 L. Ed at 973. Because "the poultry in fact had no market price at Temple [the place of shipment] or elsewhere," 244 U.S. at 37, 37 S. Ct. at 470, 61 L. Ed. at 973, the Court held that the value of the deteriorated poultry was properly measured by the price obtained when the shipper resold the poultry some time later.

The error of the Third Circuit is that it perceived the "market value test" as a hard and fast rule which had to be applied in all cases. However, in *Illinois Central R. Co. v. Crail,* 281 U.S. 57, 50 S. Ct. 180, 74 L. Ed. 699 (1930), this Court clearly held that "The test of market value is at best but a convenient means of getting at the loss suffered. It may be discarded and other more accurate means resorted to, if, for special reasons, it is not exact or otherwise not applicable." 281 U.S. at 64-65, 50 S. Ct. at 181. Plaintiff Crail was a wholesale purchaser and reseller of coal. He purchased in carload lots of 60,000 pounds or more. One particular carload which should have weighed 88,700 pounds was delivered with a shortage of 5,500 pounds. The Plaintiff sought to recover the costs of purchasing 5,500 pounds of coal at his destination, valuing the loss at retail prices because coal could not be purchased at wholesale prices when the amount was less than a carload. The Plaintiff had not purchased any retail coal: he simply continued purchasing wholesale carloads. The defendant railroad argued that the most accurate measure of actual loss was the wholesale price.

Justice Stone held that even though the "market value test" would require use of the retail price, which would be the market value of 5,500 pounds of coal, the wholesale price should be used because it more accurately measured the Plaintiff's loss. Mr. Justice Stone explained in the following language that a uniform test was inappropriate, saying "We perceive no advantage to be gained from an adherence to a rigid uniformity, which would justify sacrificing the reason of the rule, to its letter.

The aircraft engine in this case had no real market because it was not known whether it was damaged. One of the reasons most often cited by the various Circuit Courts for the rejection of use of market value in Carmack Amendment cases has been the absence of any meaningful market for the damaged goods. In this case, the absence of information which deprived the engine of a meaningful market was only temporary. The tests were performed and the engine was resold for only $4,000 less than the original purchase price. That price deduction also included an allowance for an engine cowling which was damaged in transit and not delivered with the engine when it was ultimately sold.

The principle that the market value test is not to be invariably applied was recognized by the Circuit Courts as long ago as 1932. In *United States v. Palmer & Parker,* 61 F.2d 455 (1st Cir. 1932), a claim was made for damage to and delay of a shipment of mahogany logs. There was no organized market for the sale of mahogany logs in the United States.

The First Circuit reversed the Trial Court and held that the use of a market value test was erroneous. Judge Anderson explained

> (1) We think the court below erred in applying the market value of logs in this case. There is only one rule, of universal application, in such cases, and that is to give compensation for the loss suffered. Frequently, this ideal is found impossible of complete attainment; perhaps generally the market value rule is found to be the nearest approach to reaching the actual loss. But the market value rule is inapplicable when, on the facts, it is not the nearest practicable approach to an ascertainment of the actual loss. Each case must be governed by its own facts. *Magnin v. Dinsmore,* 62 N.Y. 35, 46, 20, Am. Rep. 442.

Judge Anderson ruled that the market value of the logs had no real bearing on the loss suffered by the plaintiff. Relying on *Illinois Central R. Co. v. Crail,* he found that the real loss to the plaintiff was the inability to sell products to be manufactured with the logs. This loss was to be diminished by the price received from the goods manufactured from the undamaged portion of the shipment. Thus, the damages were to be offset by sales of merchandise, even though those resales took place several months later than the contractual date of delivery.

In 1964, the United States Court of Appeals for the Seventh Circuit rejected the use of the market value test, because the market value was irrelevant to the plaintiff's loss. In the case of *Great Atlantic & Pacific Tea Company v. Atchison, Topeka & Santa Fe Railway Co.*, 333 F.2d 705 (7th Cir. 1964), *cert. denied,* 379 U.S. 967, 85 S. Ct. 661, 13 L. Ed. 2d 560 (1965). Chief Judge Hasting understood that "The measure of damages in delay and damaged goods cases is actual damages, and the market value rule has been adopted as a method to ascertain actual damages," 333 F.2d at 708. However, he also found that "Since the market value rule is merely a method, it is not applied in cases where it is demonstrated that another rule will better compute actual damages." *Id.* Furthermore, he said that "As at common law, the fair market value is not applied when actual damage can more nearly be ascertained by other means." *Id.* at 708-09. Chief Judge Hasting relied in part on the *Illinois Central* and *United States v. Palmer & Parker Co.* results.

This rationale was adopted by the Ninth Circuit in 1970 in the case of *F.J. McCarty Co. v. Southern Pacific Co.*, 428 F.2d 690 (9th Cir. 1970). The Trial Court had employed a contract price method for determining damages. In an opinion by Judge Trask, the Ninth Circuit approved this choice, quoting verbatim from the *Great Atlantic* and *United States v. Palmer & Parker Co.* cases. The Ninth Circuit specifically held that the market

value test should not be used where the goods involved had no market value. 428 F.2d at 692.

The Fifth Circuit followed these precedents in the case of *Hector Martinez & Co. v. Southern Pacific Transportation Co.*, 606 F.2d 106 (5th Cir. 1979). Judge Vance said "In applying that statute [the Carmack Amendment], we first examine the extent to which the innocent party has actually been injured by the alleged breach. This inquiry assists in determining how the innocent party can be restored to the position in which he would have been had the contract been fully performed." 606 F.2d at 108. The Fifth Circuit held that the Plaintiff was entitled to damages for the delay in delivering its equipment, even though the market value of the equipment which was delivered had not decreased.

The actual loss to the shipper, Futura, in this case was the loss of the benefit of the contract to sell the engine to Bronxville at a price of $40,000. The right of recovery was limited to $30,000 because that was the value of the shipment placed on the bill of lading. After an expenditure of approximately $6,500, the engine was sold to Bronxville for $36,000. If the shipper has not performed these inspections and tests, the carrier could have done so during the course of discovery at its own expense. Under these circumstances, measurement of damages by a standard that takes into account the costs of determining the existence of damage and the diminution in value by reason of the damage and delay in sale is a far more accurate measure of the actual loss of the shipper than a market value standard, particularly where no market existed for the resale of the potentially damaged engine. The holdings of the Third Circuit clearly conflict with the more flexible approaches of the First, Fifth, Seventh and Ninth Circuit Courts of Appeal. These conflicts justify the grant of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

II.

The decision below raises significant and recurring problems concerning determination of damage claims involving technologically sophisticated equipment where the extent of damage is not readily determinable at the time of delivery.

This Court has not had the occasion to address this subject since 1930. Since that time, the nature of the cargo shipped by common carrier has substantially altered. A review of cargo cases for most of the history of the Carmack Amendment reveals that they are concerned with products such as foodstuffs, livestock and simple machined parts or artifacts. In most of these cases, damage to the goods was evident upon visible inspection, or with the use of simple, virtually costless testing. Most of these goods could be replaced in a known market where prices could be retroactively determined. It was relatively easy to determine whether goods were damaged but usable, and therefore could be sold in a known market for damaged goods of that type, or whether the goods were totally useless except for scrap.

Now, with the advent of electronics, computers and new design techniques, consumer and industrial equipment has become increasingly sophisticated. Developments such as microminiaturization and closer tolerances for industrial equipment mean that when there is exterior damage to the outside or packaging of such equipment, it is more unlikely that an inspection at the point of shipment will reveal the extent of damage to the cargo. In cases with facts similar to those presented in this action, the mere possibility of damage to sophisticated equipment will mean that the equipment cannot be used or sold until the extent of the damage has been ascertained.

The Plaintiffs here have used their ignorance at the time of settlement with Futura of the true condition of the engine as a weapon to increase the total amount they have recovered. They

contend that if the damage is undetermined, the cargo should be viewed as if it were damaged, and that the absence of a market for their goods should be viewed as the equivalent of placing little or scrap value upon the goods. The Trial Court modified this position slightly, but conditioned the usefulness of the tests of the true nature of the damage to the engine and the subsequent resale to cases where independent third parties who were potential purchasers of the engine would expend their own funds to conduct the tests. Both of these formulations are inconsistent with a determination of the "actual loss or injury" to the property of a shipper.

The time has come to state clearly that if the actual condition of damaged cargo becomes known prior to the time of trial, it should be considered by a jury when the time comes to fix damages. Such a standard does not impose a duty on a shipper to spend funds to conduct tests, unless the duty to conduct tests is to be derived from the duty of all plaintiffs in civil cases to prove by a preponderance of the evidence the amount of the damages to their goods. Certainly, it is a common sight in both the federal and state courts to observe the testimony of experts seeking after expert inspections to fix the value of damage claimed by plaintiffs. However, if in a particular case, there is no such burden, then the defendant carrier may during the course of the claims process or during the course of discovery in litigation perform the necessary tests to determine the extent of damage and to offer that information to the jury. Such a standard certainly would not impose a duty of repair upon the shipper as the opinion of the Third Circuit suggests. A shipper should not be allowed to hide his head in the sand, refuse to determine whether his goods have been damaged, refuse to permit a carrier to determine whether the goods have been damaged and then claim the goods have little or no value because the extent of the damage is not known. When that knowledge becomes available at a time subsequent to the time of delivery, the market value test should give way to a test

that incorporates probative evidence of the actual condition of the potentially damaged goods.

As the use of sophisticated electronic and industrial equipment grows, the percentage of shipments carried by common carriers of such equipment will also increase. Claims involving such goods will necessitate the use of expert examinations and technical equipment to determine the existence and the extent of damage. A decision by this Court clarifying the methods to be used by juries if they are to award damages in cases arising under the Carmack Amendment and its successor provisions will be of use in thousands of cases in the federal and state courts involving millions of dollars of claims. This Court should consider this case because technological developments have rendered the general rule inapplicable to a growing number of important cargo cases.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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APPENDIX

OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-5131

GERLING GLOBAL GENERAL INSURANCE COMPANY, a corporation of Canada; NORTHUMBERLAND GENERAL INSURANCE, a corporation of Canada; COMMONWEALTH INSURANCE COMPANY, a corporation of Canada; ELITE INSURANCE COMPANY, a corporation of Canada; SCOTTISH & YORK INSURANCE COMPANY, a corporation of Canada; SOVEREIGN GENERAL INSURANCE, a corporation of Canada; SUBROGEES OF FUTURA AIRLINES, LTD. and FUTURA AVIATION SERVICES, LTD., FUTURA AIRLINES, LTD., and FUTURA AVIATION SERVICES, LTD.,

Appellees

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, a Delaware corporation, and ATLANTIC AVIATION CORPORATION, a Delaware corporation, Consolidated Freightways Corporation of Delaware, Inc.,

Appellant

On Appeal from the United States District Court for the District of Delaware

Opinion and Judgment

(D.C. Civil No. 82-0344)

District Judge: Honorable Walter K. Stapleton

Submitted Under Third Circuit Rule 12(6)
October 25, 1984

Before: GIBBONS and BECKER, *Circuit Judges*
and KATZ, *District Judge**

(Filed Dec. 18, 1984)

MEMORANDUM OPINION OF THE COURT

BECKER, *Circuit Judge.*

This is an appeal from a judgment entered on a jury verdict in the amount $39,170.50 in favor of Gerling Global Insurance Company on its subrogation claim against Consolidated Freightways Corporation, a trucking company that transported a jet engine from the Futura Corporation facility in Vancouver, Canada, to Atlantic Aviation in Wilmington, Delaware. The engine was damaged in transit and, by its verdict, the jury found that Consolidated was responsible for the loss, and fixed damages at $30,000.00. This exceeded the amount of Gerling Global's subrogation claim, and judgment was entered against Consolidated in that amount ($29,950) plus interest. Consolidated Freightways'

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* Honorable Marvin Katz, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

principal contention is that the trial court erred in its damages charge.[1]

The operative facts are essentially not in dispute. Futura Aviation, owner of the engine, contracted to sell it to Bronxville Equipment Company for $40,000, and to ship it to Atlantic Aviation. Consolidated Freightways was hired to transport it. The engine was damaged during shipment in such a way that, as delivered, it was valued by an expert witness at $5,000, its worth as scrap. Gerling Global, Futura's insurer, paid $29,500 on the damage claim and thereby became subrogated to Futura's rights. Subsequently, the engine was transported to the manufacturer, Rolls Royce Corp., in Montreal, Canada, where repairs costing $8,605.08 Can[2] were made; the engine was then sold for $36,000.00.

As subrogee, Gerling Global instituted the present action against Consolidated Freightways. The district court instructed the jury that damages should be calculated as the difference between the value before and the value after the damage occurred. Furthermore, the court instructed that the maximum amount any award should be $29,950.00, the price paid by the insurance company on its policy and repair costs, and that subsequent sale price should be relevant, but not dispositive, in calculating actual damage. In the wake of this charge, the jury assessed damage at $30,000.00.

Appellant Consolidated Freightways argues that the instructed measure of damages would permit, and in fact resulted in, a

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1. Consolidated appeals on three other grounds, but we find that the other grounds are without merit and do not warrant discussion.

2. Approximately $6,500.00 U.S.

windfall recovery for Futura. Futura received $29,950 under its insurance policy with Gerling Global plus $36,000 from the final purchase price, for a total of $65,950. Subtracted from this is the approximate sum of $6,500 expended for repairs, yielding a net receipt by Futura of $59,450. Appellant calculates that this is about $20,000 in excess of the original $40,000 purchase price Futura would have received had there been no damage to the engine. Appellant contends that, at the maximum, Gerling Global should be entitled to receive the difference between the original sale price of $40,000 and the final sale price of $36,000, plus the $6,500 expended on repairs, or a total of $10,500.

Appellant's calculations are flawed, however, in that the measure of damages is merely informed and not determined by the post-hoc transactions. Carriers are liable for damages occurring in transit in the amount of the "actual loss or injury to the property." 49 U.S.C. § 11707(a)(1). The loss or injury is valued at the difference between the market value of the property before it was damaged, and the value of the property after it was damaged. *Gulf, Colorado & Santa Fe Railway v. Texas Packing Co.*, 244 U.S. 31, 37, 37 S. Ct. 487, 489 (1917); *Contempo Metal Furniture Co. of California v. East Texas Motor Freight Lines*, 661 F.2d 761, 764 (9th Cir. 1981). Indeed, the rule advocated by Consolidated would impose an obligation to repair, and would subject damage calculations to future variations in market prices. Such a rule would be at variance with the accepted method of damages measurement.

The court's charge gave the jury the option of taking into account the possibility of a windful recovery and of rendering a verdict consistent with appellant's view. However, the jury did not do so, and it was clearly entitled to credit the opinion of the

expert witness who valued the damage at $29,950. We conclude that the instructions of the district court were correct. Its judgment will be affirmed.

TO THE CLERK:

Kindly file the foregoing opinion.

s/ Edward Becker
Circuit Judge

DATED: